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Janice C. Martin, Widow, Gaylynn Martin, Michelle Martin, Gary Chadwick Martin, And Val James Martin, Minors By And Through Their Guardian Ad Litem, Jance C. Martin v. Lynn D. Christensen And Farmers Insurance . Ex-Change, A California Corporation : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JANICE C. MARTIN, Widow, GAYLYNN MARTIN, MICHELLE MARTIN, GARY CHADWICK, and VAL JAMES MARTIN, Minors by and through their Guardian Ad Litem, JANICE C. MARTIN,
Plaintiffs and Appellants,
vs.
LYNN D. CHRISTENSEN and FARMERS INSURANCE EXCHANGE, a California Corporation,
Defendants and Respondents.

Case oN. 11450

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court in and for Salt Lake County
Honorable Stewart M. Hanson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF THE KIND OF CASE

Plaintiff, Janice C. Martin, was injured and her husband, Gary Martin, fatally injured in a motor vehicle pedestrian accident that occurred December 1, 1967, in Salt Lake County, Utah. The driver of the vehicle, Lynn D. Christensen, who is a defendant in this action, was an uninsured motorist. At the time of this accident, Gary Martin owned two motor vehicles and each vehicle was insured by the Farmers Insurance Exchange for uninsured motorist coverage. Two policies identical in language had been issued by the Farmers Insurance Exchange — the

only difference being the automobile described in each policy and the premium. The sole question presented by this case is the amount of insurance coverage available to plaintiffs.

DISPOSITION IN THE LOWER COURT

Janice C. Martin on behalf of herself and as guardian of her minor children commenced suit in the District Court of Salt Lake County seeking damages for her personal injuries and damages for the death of her husband against Lynn D. Christensen and the Farmers Insurance Exchange. As noted above, Lynn D. Christensen, was an uninsured motorist and the Farmers Insurance Exchange provides uninsured motorist coverage on two vehicles owned by decedent, Gary Martin.

The complaint of plaintiff (R. 1-4) does not clearly specify the real issue in this case, but simply asks for judgment in the amount of Two Hundred Fifty Thousand ($250,000) Dollars for the death of Gary Martin and Two Hundred Fifty Thousand ($250,000) Dollars for the injuries to Janice C. Martin. The uninsured motorist, Lynn D. Christensen, did not answer or otherwise appear in the action. Defendant, (respondent) Farmers Insurance Exchange answered the complaint of the plaintiff; admitted that it provided uninsured motorist coverage to plaintiffs; denied generally the other allegations of the complaint; and specifically requested that the Court determine and declare that the amount of un-

insured motorist coverage available to plaintiffs under their contract with Farmers Insurance Exchange was limited to Ten Thousand ($10,000) Dollars for the death of Gary Martin, and Ten Thousand ($10,000) Dollars for injuries sustained by Janice C. Martin (R 5-8). At the same time, respondent, Farmers Insurance Exchange, offered to permit a judgment to be entered against it in the amount of Twenty Thousand ($20,000) Dollars, the amount of coverage it claimed owing to plaintiffs (R. 16) and moved the Court for a Summary Judgment declaring that the total amount of Twenty Thousand ($20,000) Dollars was the ultimate legal responsibility of Farmers Insurance Exchange to plaintiffs. Thereupon the plaintiffs moved the Court for a Summary Judgment (R 18) asking the Court to hold that the ultimate legal responsibility of the Farmers Insurance Exchange was Forty Thousand ($40,000) Dollars. The real issue in the case was thus joined.

Based upon the clear unequivocal language of the contractual provisions of the two insurance contracts, the Lower Court granted the Motion of Farmers Insurance Exchange. Plaintiffs prosecute this Appeal from that Order and Judgment.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a reversal of the Judgment and Judgment in their favor as a matter of Law.

STATEMENT OF FACTS

Respondent agrees generally with the facts stated in the Brief of Appellant. However, Respondent does not agree with the conclusion stated therein that the Lower Court erred in granting Respondents Motion for Summary Judgment. On the contrary as will be pointed out in the Points of Argument, the Judgment of the Lower Court is correct.

ARGUMENT

POINT I.

THE LOWER COURT PROPERLY GRANTED A SUMMARY JUDGMENT TO FARMERS INSURANCE EXCHANGE HOLDING THAT THE TOTAL AMOUNT OF INSURANCE COVERAGE AVAILABLE WAS TEN THOUSAND ($10,000) DOLLARS FOR A SINGLE INJURY AND TWENTY THOUSAND ($20,000) DOLLARS FOR A SINGLE ACCIDENT.

As noted above and in the Brief of Appellant, Gary Martin owned two automobiles and each was insured by Farmers Insurance Exchange under separate insurance contracts, identical however, in their terms. Each of the policies issued to Gary Martin contained General Conditions. The condition pertinent to the legal question in this case reads:

(7) OTHER INSURANCE IN THE COMPANY

> "With respect to any occurrence, accident or loss to which this and any other insurance policy or policies issued to the insured by the Company also apply, no payment shall be made hereunder which, when added to any amount paid or payable under such other insurance policy or policies, wo uld result in a total payment to the insured or any other person in excess of the highest applicable limit of liability under any one such policy." (R. 13-15)

The language of the quoted condition is clear and unequivocal. It says very succinctly and precisely that if an insured has other applicable coverage with the company that payment for loss shall not exceed

the single highest limit under any one policy. It is admitted by plaintiffs that both policies issued to Gary Martin had identical uninsured motorist coverage and that each policy contains the condition set forth above.

The quoted condition is not unique to the policies issued by Respondent, Farmers Insurance Exchange. This condition, or one of similar import, is contained in every automobile liability policy written in this Country. There may be some exceptions but Respondent has not been able to locate any. The Court will find that automobile liability insurance contracts will generally follow a standard form in use throughout the insurance industry. From time to time, over the years, the standard form will be changed to meet changing coverages and changing conditions. These various standard policies have been compiled in a work by *Risjord and Austin* entitled "*Automobile Liability Insurance Cases.*" The condition we quote above came into being in the 1959 standard policy. As a matter of common knowledge we know that over the years it has become customary for the average American family to have two and perhaps more cars in the family. It is also very usual and standard for these family automobiles to be insured by the same insurance company. The reason is that it is convenient for a family to deal with one insurance agent and in most cases, as was the case here, the family receives a discount when more than one automobile is insured with the company. In the Martin case on

Policy No. 6643-00-14, the single car premium was $67.80; with the second car discount the premium was $52.52. On Policy No. 6643-12-14, the single car premium is $72.10 and with the second car discount the premium was $61.70.

The quoted condition was adopted to specifically meet the growing situation where there was more than one automobile in the family and to prevent multiple or pyramiding insurance limits. An illustration at this point may be helpful. Assume a person is driving a borrowed vehicle with the permission of the owner. This driver also has two vehicles of his own insured by the same insurance company under separate policies. He gets in an accident and causes personal injuries to the driver of another vehicle. Assume further that there is Ten Thousand ($10,000) Dollars coverage on the vehicle he is driving and Ten Thousand ($10,000) Dollars coverage on each of his automobiles. It is uniformly held that the coverage on the vehicle involved in the accident is primary and that other insurance on the driver is excess. But, the further question in this illustration is just how much excess insurance is there? Does the insurance on just one of the vehicles owned by the driver apply, or, does the insurance on both vehicles apply? The insurance industry elected to resolve this question by the adoption of contractual language of the quoted condition. In the illustration given, under the language of the condition, the insured driver would have available to him the coverage on

the vehicle he was operating as well as the highest single limit on the two vehicles he owns.

As indicated, the purpose of the condition is to resolve in advance any question that might arise concerning the amount of coverage available where the insured has more than one car insured in the company.

So far as can be now ascertained this insurance condition has never been before a Court of Last Resort in this Country. The decision of this Court then, concerning this condition, will be a "landmark" decision and certainly of more than a passing interest to the insurance industry.

Respondent does not view the problem in this case as one of construction or interpretation of language. The language of the condition is very clear and very understandable. The issue is whether the Respondent, and for that matter the insurance industry, has a right to limit its ultimate liability for a single loss.

The applicable general textbook authority is set forth in Volume 29, American Jurisprudence (Insurance—Section 227.) It reads:

> "In the absence of a statutory provision to the contrary, an insurance company may limit its liability and impose restrictions and limitations on its contractual obligations not inconsistent with public policy."

This general principle has been approved in numerous jurisdictions.

The Utah case of *Jones vs. New York Life*, 69 Utah, 172, 253 Pac. 200, involved an application for a life insurance policy. The proposed insured in this case had completed an application and had been examined by a doctor. He was approved by the company for a policy and the policy had actually been issued and delivered to the agent. However, before the premium had been paid the proposed insured had been examined by a doctor and it was found that he was suffering from meningitis and that he died within a few days thereafter. The application provided that there would be no insurance if the proposed insured had consulted a physician prior to the payment of the premium. The Court ruled that insurance contract had not come into force by reason of the breach of conditions set forth in the application. The Court stated in part:

> "It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective."

Certainly if an insurance company can legally contract and condition the effect of its policy of insurance it has the legal power to limit the extent and amount of liability for which it will be responsible.

New York Life vs. West, 82 Pac. 2d, 754 (Colo.):

> "It seems clear to us that it is within neither the intention nor the power of the Legislature or the Courts to compel an insurance company to write

a policy, or prevent it from limiting a policy written to any specific accident or class of accidents."

C.P.A. Company vs. Jones, 263 Pac. 2d, 731 (Okla.)

"It is well established that an insurance company may limit the risks for which it is responsible."

Trinity Universal Insurance Company vs. Willrich, 124 Pac. 2d, 950 (Wash.)

"The relation between an insurer and an insured is purely a contractual one. . . . It is axiomatic that competent persons may make such a contract for insurance as they may see fit, provided that it does not contravene any provision of statutory law and is not opposed to public policy. . . . It follows, therefore, that in the absence of some statutory provision to the contrary, an insurance company may seek to limit its liability and to impose restrictions and limitations upon its contractual obligations not inconsistent with public policy."

The undoubted right of the insurance company to limit its liability is conditioned only upon considerations of public policy or statutory law.

At this point it is well to consider the Utah case of *Russell vs. Paulson*, 18 Utah 2d, 157, 417 Pac. 2d, 658, which is an uninsured motorist coverage case and is clearly analogous to the case at bar. In that case a passenger in a vehicle was injured by an uninsured motorist. There was uninsured motorist cov-

erage on the vehicle in which she was riding and she was also entitled to the same type of coverage on her family automobile. The insurer on the automobile in which she was riding settled her claim for $4,500 without answering the suit. She thereupon obtained a default judgment against the administrator of the estate of the uninsured motorist in the amount of $10,000. Summary judgment was granted to the plaintiff against her own insurer for the sum of $5.000.

On appeal this Court reversed the summary judgment and in its holding extensively discussed the "excess clause" and "pro-rata clause" contained in the two insurance policies. The Court stated in part:

> "The reasoning of the Oregon Court is persuasive, but we are constrained to adopt the majority rule which imposes primary liability of the "pro-rata Insurer" and secondary liability on the "excess insurer".'

The Court stated further:

> This Court has seriously considered the reasoning in both the Smith and Burcham cases and can find no compelling reason for departing from the majority rule as stated in Burcham. The applicable limits of liability in both Russell's and Gritton's policy were $5,000 per person. Thus the applicable limits of the Russell policy did not exceed the applicable limits of Gritton's policy. The language is free and clear of ambiguity, that since the limits of Russell's policy did not exceed Gritton's excess coverage cannot be applied in Russell's policy."

In so holding this Court cited with approval, language from the leading case of *Burcham vs. Farmers Insurance Exchange*, 121 No. West, 2d 500 (1963 — Iowa.)

Discussing the majority rule preferring the excess clause over the pro-rata clause, our Court quotes the Burcham case, supra, as follows:

> "The basis for so holding is not always clear. It may, however, be justified on what is a rational basis of the intent of the insurance industry in its use of such clauses to set up order of payment and limit amounts payable to prevent double recovery."

Our Court is with the majority of Courts in the interpretation and effect given the "excess clause" and the "pro-rata clause" contained in automobile liability insurance policy. The effect of "Condition 7" in the Farmers Insurance Exchange policy is to reach the same result where the same insurance company issues two policies to the same person or family as where two different insurance companies cover the same loss and their rights and responsibilities are set forth in the "excess and pro-rata clauses."

Respondent submits that the reasoning of the Russell case, supra, quoting extensively from the Iowa case of Burcham, supra, is controlling on the case at bar. To reverse the Lower Court would be to cast doubt upon the reasoning of the Russell case supra. Respondent is asking the Court to affirm the judgment of the Lower Court.

"on what is a rational basis of the intent of the insurance industry in its use of such clauses (Condition 7) to set up order of payment and limit amounts payable to prevent double recovery."

POINT II.

CONDITION 7 OF THE INSURANCE CONTRACT DOES NOT VIOLATE UTAH LAW OR CONTRAVENE THE ESTABLISHED PUBLIC POLICY OF THE STATE.

As indicated under the preceding Point an insurance company may legally limit its liability subject only to positive statutory command and established public policy.

Appellant does not argue that Condition 7 of the insurance contract violates any statutory prohibition, but Appellant does argue that Condition 7 does frustrate the intent of the uninsured motorist provisions of Utah Law, and is contrary to public policy.

The reverse is true. Condition 7 is in complete harmony with the Law and public policy of the State of Utah relative to uninsured motorist coverage.

The provision of our Code relative to uninsured motorist coverage is Title 41-12-21.1 adopted by the legislature in 1967. This statute reads:

> "Commencing on July 1, 1967, no automobile liability insurance policy insuring against loss resulting from liability imposed by law for bodily injury or death or property damage suffered by any person arising out of the ownership, maintenance or use of a motor vehicle, shall be delivered, issued for delivery, or renewed in this state, with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in such policy or a supplement to it, in limits for bodily injury or death set forth in section 41-12-5, under provisions

filed with and approved by the state insurance commission for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. The named insured shall have the right to reject such coverage, and unless the named insured requests such coverage in writing, such coverage need not be provided in a renewal policy or a supplement to it where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer."

The purpose of this legislation was to alleviate the economic burden cast upon the injured by the uninsured motorist. It was also designed in part to head off a demand for compulsory automobile insurance. This is a more desirable method because States that have compulsory automobile insurance have found that such a Law drives the cost of insurance premiums up to prohibitive levels.

The statute demands that a limit of $10,000 and $20,000 for a single accident be provided by the policy under conditions approved by the State Insurance Commission. These are the amounts provided in the policies in this case and there is no evidence that the form of policy has not been approved by the Insurance Commission.

Rather than frustrate the provisions of this section of the Code the policies in question conform exactly to it. This statute embodies the public policy of

this State relative to uninsured motorists and insurance coverage therefor and the insurance policies in this case are not in opposition to the Law in any respect. Plaintiffs in this case have been afforded the amount of protection provided by the statute and in fact the full statutory limit has been offered to them in settlement.

POINT III.

FARMERS INSURANCE EXCHANGE HAS NOT WAIVED ANY PROVISION OR CONDITION OF ITS POLICIES.

The Farmers Insurance Exchange has not waived condition 7 of the policy by issuing two policies and by accepting the premium therefor as contended by appellants. Appellants cite no facts that would indicate a waiver in this case and the only authority cited is 28 American Jurisprudence 2d, Estoppel and Waiver, Section 162. That Section merely states that:

"(a) rights secured by contract may be waived . . ."

No-one can quarrel with that principle but it has no application to this case.

Appellant should also be made aware of Condition 3 set forth in the insurance contracts which reads as follows:

(3) CHANGES:

"Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a party of this policy." (R. 14)

Waiver is generally defined in Law as "volun-

tary and intentional relinquishment of a known right."

> 28 American Jurisprudence, Estopel and Waiver, Section 154.

There is no evidence in this case of a waiver, express or implied, and the very terms of the insurance contract negative any such intention on the part of Farmers Insurance Exchange. Had there been an endorsement waiving this policy term appellants should produce it. Respondent assures the court that no such endorsement exists.

CONCLUSION

Condition 7 of the insurance contracts in issue in this case limit the liability of the insurance company on any one loss to the highest single limt of any one policy. Conditions such as Condition 7 are found in almost every automobile insurance contract written in this Country.

Respondent in this case and indeed the insurance industry has a legal right to limit its liability providing that the limitation does not contravene established statutory law or the public policy of the State. The foregoing principle was in effect adopted by the Utah Supreme Court in the case of Russell vs. Paulson, supra, as applied to the "excess clause" and "pro-rata clause" contained in the policies of different companies as applied to a single loss. The same reasoning of that case should apply in this case involving the limit of liability of an insurance company where two policies are issued by the same company.

There is no evidence of a waiver by the insurance Company of Condition 7 of the policy and no evidence that Condition 7 contravenes the Law or public policy of the State of Utah. In fact, the policies in question conform strictly to the Law of the State of Utah, and plaintiffs in this case have been afforded the protection required by the statute and in fact plaintiffs have been offered the full amount of money provided by Law.

The decision of the Lower Court must be affirmed.

Respectfully submitted,

HANSON & GARRETT